Filed 3/4/19 P. v. Nailor CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DUANE ALAN NAILOR, Defendant and Appellant.	A147919 (Alameda County Super. Ct. No. 173751)
In re DUANE ALAN NAILOR, on Habeas Corpus.	A151019

Following the first phase of a bifurcated trial in which a jury found defendant guilty of, among other things, attempted manslaughter and evading the police, defendant agreed to waive his right to appeal and to withdraw his not-guilty-by-reason-of-insanity plea based on the understanding that the court would impose a prison sentence of no more than 12 years 2 months. Upon entry of his waiver and change of plea, the court sentenced defendant as anticipated to 12 years 2 months in prison. On appeal, defendant asserts that the trial court's questioning of witnesses in the first phase of the trial violated his right to due process and that the court erred in imposing sentence. The Attorney General argues that defendant has waived or forfeited all of his claims and that, alternatively, there are no prejudicial errors that require reversal. In his consolidated petition for habeas corpus, defendant alleges that his waiver of appellate rights was involuntary because it was entered in response to the trial judge's statement that he would

impose a greater sentence if defendant proceeded to trial on his not-guilty-by-reason-of-insanity plea. Defendant's trial counsel has submitted a declaration stating facts that, if true, would likely entitle defendant to relief on his habeas petition. In the interests of efficiency and given the unusual circumstances under which defendant's waiver was entered, we shall not enforce the waiver and instead shall address defendant's arguments on the merits. We reject defendant's judicial misconduct claim and find no prejudicial error with regard to imposition of defendant's sentence. Accordingly, we shall affirm the judgment.

Background

On January 4, 2016, defendant was charged with attempted murder (Pen. Code,[1] §§ 187, subd. (a), 664, subd. (a)), aggravated mayhem (§ 205), assault with a deadly weapon (§ 245, subd. (a)(1)), assault with a deadly weapon against a different victim (§ 245, subd. (a)(1)), evading the police (Veh. Code, § 2800.2, subd. (a)), and assault against a police officer (§ 245, subd. (c)). The amended information further alleged defendant had used a deadly weapon, a pipe, in counts 1 and 2 (§ 12022, subd. (b)(1)), and had inflicted great bodily injury in counts 1 and 3 (§ 12022.7, subd. (b)).

Defendant pled not guilty and not guilty by reason of insanity, and the matter was set for a bifurcated trial in which the jury would first determine his guilt and then, if necessary, decide the issue of his sanity.

During the first phase of the trial, there was evidence that following a verbal altercation defendant beat the victim with a pipe, causing great bodily injury, then led the police on a high speed chase before crashing his car into a tree. As defendant states in his opening brief, "There was little dispute over the facts of the offense at trial. The issues lay in appellant's mental state at the time of these crimes." Defendant and his expert testified that at the time of the crime defendant was delusional and experiencing a psychotic episode. Defendant explained that he had a history of psychosis that was controlled by medication but that shortly before the incident, due to a lack of housing, he

[1] All statutory references are to the Penal Code unless otherwise noted.

had recently stopped taking his medication. At the time of the crime, he thought that he was a "special ops agent" who was "patrolling the Berkeley streets." When he came across the victim, he thought he was the devil.

The jury found defendant guilty of attempted manslaughter, simple mayhem, assault with a deadly weapon, and evading the police. He was found not guilty of the remaining counts. The jury also found true the deadly weapon and great bodily injury enhancement allegations.

After the jury delivered its verdicts, defendant agreed to waive his right to appeal and to withdraw his insanity plea based on the understanding that the maximum sentence the court would impose would be 12 years 2 months in prison. Defendant's counsel stated at the hearing, "I have . . . advised [defendant] that while I can discuss his chances of appeal and his right to appeal, I am not in a position to discuss the right to appeal as it relates to my own ineffectiveness of counsel because that would be a conflict. But as to the other issues of appeal, we've discussed it at length and he's wanting to go forward" with the change of plea. Prior to accepting defendant's change of plea, the court advised defendant: "[Y]ou're going to be giving up your right to appeal any issues that might have occurred in the guilt phase of the trial. [¶] And . . . the only issue that could be appealed is incompetency of counsel . . . . That's the only issue. Everything else you don't have a right to appeal on." Defendant confirmed that he understood he was waiving his right to appeal. When defendant asked whether there was a possibility that the judge might sentence him to less than 12 years 2 months, the judge responded, "Probably not. I mean, we've looked at everything. That won't happen."

Trial counsel's declaration submitted in support of defendant's petition for habeas corpus offers additional context to the change of plea and sentencing. Counsel states, "The most serious charges Mr. Nailor faced at trial were the charge of premeditated attempted murder, and aggravated mayhem, which both carried life sentences. [¶] After the jury acquitted Mr. Nailor of the charges of premeditated attempted murder and aggravated mayhem, convicting him of the lesser-included charges . . . , his exposure at

sentencing changed considerably. [¶] After the guilt phase verdicts, there was an unreported in-chambers discussion between judge, the district attorney and me. The judge indicated that, if defendant withdrew his not guilty by reason of insanity plea and waived any appeal, he would sentence him to state prison for 12 years, two months. Otherwise, defendant would receive the maximum state prison term of 13 years, six months. [¶] In response to my argument that the maximum term was 12 years, two months because the blows inflicted by the defendant were one single indivisible act, the judge advised me that all he had to do was find that defendant 'reflected' between the blows, and he could sentence him consecutively on counts 1, 2, and 3 – that is he would sentence him consecutively on the attempted voluntary manslaughter, simple mayhem and assault with a deadly weapon. . . . [¶] After thoroughly discussing the matter with the defendant, he chose to accept the judge's indicated sentence and to withdraw his not guilty by reason of insanity plea and waive any appeal. [¶] Under these circumstances, I believed that any objection to the imposition of the aggravated term would have been futile."

The court sentenced defendant to a 12-year 2-month prison term. The court noted that the sentence was not pursuant to a "negotiated plea," but that it was selected "pursuant to negotiations." Although the parties and the probation department submitted sentencing memoranda addressing the circumstances in aggravation and mitigation, the trial court did not state the reasons for its sentencing choices on the record.

Defendant timely filed a notice of appeal. Defendant's habeas petition was filed after briefing in the appeal was complete and was subsequently consolidated with the appeal.

Discussion

1. *Waiver of Appellate Rights*

Defendant's waiver was entered in conjunction with his change of plea and with the understanding that the court would impose a sentence of 12 years 2 months rather than the maximum term available, which was 13 years 6 months. While the court

observed that defendant had not entered a traditional "negotiated plea," it also acknowledged that the agreement was entered "pursuant to negotiations." In *People v. Clancey* (2013) 56 Cal.4th 562, 574, the Supreme Court differentiated between a judicial plea bargain, which is not permitted, and the trial court advising a defendant of an indicated sentence to help facilitate entry of a plea, which is permissible. The court stated, however, that when announcing an indicated sentence, a trial judge ''may not offer any inducement in return for a plea of guilty or nolo contendere. It may not treat a defendant more leniently because he foregoes his right to trial or more harshly because he exercises that right.' " (*Id*. at p. 575.) Nor may the trial judge "*bargain* with a defendant over the sentence to be imposed." (*Ibid*.) Defense counsel's claim that the trial judge offered a reduced sentence in exchange for withdrawal of his not-guilty-by-reason-of-insanity plea and waiver of appellate rights, if true, would run afoul of *Clancey*. Rather than issuing an order to show cause returnable to the trial court for a determination of what was said in chambers and whether defendant's waiver was voluntary, in the interests of efficiency we shall assume without deciding that defendant's waiver was involuntary and address his arguments on the merits.

2. *Judicial Misconduct*

Defendant contends that the trial court "abandoned its role as a neutral arbiter by asking questions of nearly every witnesses [*sic*], that didn't simply clarify factual issues; but clearly pointed to theories of culpability and were obviously asked to assist the prosecution, not the defense, at trial. The trial court's lines of questioning, continuing even after objection by defense counsel, cast the court into the role of an advocate for the prosecution, thereby infringing his constitutional rights to due process, an impartial jury, and reliable guilt and penalty determinations."

A trial court may control the examination of witnesses to ensure the efficient "ascertainment of the truth," and may examine witnesses on its own motion. (§ 1044; Evid. Code, §§ 765, subd. (a), 775.) " '[I]t is not merely the right but the duty of a trial judge to see that the evidence is fully developed before the trier of fact and to assure that

ambiguities and conflicts in the evidence are resolved insofar as possible.' " (*People v. Mayfield* (1997) 14 Cal.4th 668, 739.) To that end, the "court has both the discretion and the duty to ask questions of witnesses, provided this is done in an effort to elicit material facts or to clarify confusing or unclear testimony." (*People v. Cook* (2006) 39 Cal.4th 566, 597.) While courts are afforded "considerable latitude" in questioning witnesses (*People v. Carlucci* (1979) 23 Cal.3d 249, 255), the court must be careful in order to avoid taking on "the role of either prosecutor or of the defense. [Citation.] 'The court's questioning must be ' "temperate, nonargumentative, and scrupulously fair" ' [citation], and it must not convey to the jury the court's opinion of the witness's credibility." (*People v. Cook, supra,* at p. 597.)

On review, we " 'evaluate the propriety of judicial comment on a case-by-case basis, noting whether the peculiar content and circumstances of the court's remarks deprived the accused of his right to trial by jury.' [Citation.] 'The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made.' " (*People v. Sanders* (1995) 11 Cal.4th 475, 531-532.)

Here, the judge questioned 11 of 16 trial witnesses, including the defendant and his expert witness. Defendant's opening brief quotes nearly all of the judge's questions but fails to identify any particular question that he believes "went far beyond any simple requests for clarification and ventured well into the realms of advocacy." Instead, he suggests that the "length and breadth of the questions" was problematic. Regarding prejudice, defendant argues, "Even if no one series of questions or single comment impacted the jury's verdict individually, collectively they did." He acknowledges that "the jury's convictions on the lesser included offenses in counts one and two, as well as the acquittals in counts three and six, may have mitigated the damage suffered by appellant due to the trial court's misconduct in acting as a second prosecutor." He argues, however, that "the conviction in count five was largely a result of the trial court's intervention and must be reversed. Although we do not contest that appellant drove

recklessly through the streets of Berkeley while being chased by the police with flashing lights and sirens, given his acute state of psychosis at the time there remained a reasonable doubt as to whether the mens rea of willful and wanton conduct was established, especially without the additional questioning by the court that bolstered the prosecution's case on that issue."

Although the trial court asked numerous questions of both prosecution and defense witnesses, nothing about the content of the questions indicates a lack of neutrality. The questions primarily sought to clarify conflicts or ambiguities in the testimony and were temperate, nonargumentative, and balanced. The record does not support defendant's claim that the "manner and tone" of the court's questioning revealed a prosecutorial bias. "The mere fact that a judge examines a witness at some length does not establish misconduct." (*People v. Pierce* (1970) 11 Cal.App.3d 313, 321.) Moreover, the court instructed the jury, pursuant to CALJIC No. 17.30: "I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness. [¶] If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion." Absent any basis to believe otherwise, we presume the jury followed the court's instructions. (See *People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

Finally, we disagree with defendant's suggestion that the court's questioning improperly bolstered the prosecution's case with respect to the charge of evading the police. In response to questions by his counsel, defendant testified that when he left the scene of the assault, he thought he was driving to the police station. He testified, "I was unable to really see where I was going. . . . [I]t was like I had like this tunnel vision and everything was blurry. I couldn't see very well. It was like everything was blurry and black. I could see like a little, small area. I couldn't see the dashboard. I didn't see the light. I didn't see very well at all." He remembered "bumping something" but did not know that he had hit a police car. The court's questions were appropriate follow-up

questions.[2] They do not constitute misconduct, and certainly were not such as to prejudice the defendant.

3. *Sentencing*

The trial court sentenced defendant to a five-year six-month upper term for attempted manslaughter and a consecutive eight-month term for evading a police officer. The court also imposed a five-year term for the great bodily injury enhancement and a one-year term for the deadly weapon enhancement. Sentence on the remaining counts was stayed pursuant to section 654. Defendant contends the case must be remanded for resentencing because the trial court failed to state its reasons for imposing the upper term on the attempted manslaughter count and for imposing a consecutive term on the evading police count. He argues further that imposition of the upper term sentence was an abuse of discretion "given the inapplicability of the factors in aggravation relied upon by both probation and the prosecution, as well as the uncontroverted mitigating factors of [his]

[2] Following a question by the court regarding what defendant could remember, there was this exchange:

"[DEFENDANT]: . . . I remember getting into the car. I had blurred vision and I could not see very well at all. My vision was impaired. Why, I can't tell you, but it was. And I could see like an area of like the size of a silver dollar. I tried to drive and you can see what happened.

"THE COURT: Okay. And when you only saw that little dollar-size vision, tunnel vision I think you called it, right?

"[DEFENDANT]: Yes.

"THE COURT: Did you think that was dangerous driving?

"[DEFENDANT]: I don't recall thinking it was dangerous, but I'm sure that I was afraid.

"THE COURT: So you were afraid to drive?

"[DEFENDANT]: I was afraid to drive.

"THE COURT: But you still drove?

"[DEFENDANT]: Yes, I did."

lack of prior felony convictions and his mental illness." The Attorney General argues that any sentencing error was not prejudicial.

Under section 1170, subdivision (c), the court is required to "state the reasons for its sentence choice on the record at the time of sentencing." "However, where the sentencing court fails to state such reasons, remand for resentencing is not automatic; we are to reverse the sentence only if 'it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error.' " (*People v. Sanchez* (1994) 23 Cal.App.4th 1680, 1684.) Likewise, " '[i]mproper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if "[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error." ' " (*People v. Osband* (1996) 13 Cal.4th 622, 728.)

Here, the record makes clear that remand for resentencing would not result in imposition of a different sentence. The trial court clearly indicated its intent to impose the 12-year 2-month term before defendant withdrew his insanity plea and reiterated that it had "looked at everything." Contrary to defendant's argument, the sentence chosen was within the scope of the trial court's discretion.

Defendant argues that the "ONLY circumstances in aggravation listed in *both* the probation report and the prosecution's sentencing memorandum submitted by the district attorney are inapplicable in this case as they all involve dual use of facts." Defendant is correct that both the probation report and the prosecution listed as circumstances in aggravation the facts that the crime involved great bodily injury (Cal. Rules of Court, rule 4.421(a)(1)) and that defendant used a weapon (Cal. Rules of Court, rule 4.421(a)(2)). On appeal, the Attorney General concedes that these facts could not be used to support selection of the upper term or a consecutive term because defendant was separately sentenced on those enhancements. Defendant's argument ignores, however, the other facts discussed in the prosecutor's sentencing memorandum which are sufficient to support the sentence imposed. (*People v. Osband, supra,* 13 Cal.4th 622, 728-729 ["Only

a single aggravating factor is required to impose the upper term [citation], and the same is true of the choice to impose a consecutive sentence."].)

The prosecution's memorandum noted that the victim was particularly vulnerable (Ca. Rules of Court, rule 4.421(a)(3)) because he was severely intoxicated. It also indicates that the court could consider under California Rules of Court, rule 4.421(c), that the day before the present offense police investigated a similar incident in which defendant "physically threatened another man with a metal pipe like object because he believed that the man hit his car." The prosecution explained that "defendant was not arrested because the victim refused to sign a citizen's arrest out of fear of retaliation." Finally, the sentencing memorandum details six arrests between 1979 and 1994, three of which involve allegations of violence. Given the court's unambiguous belief that defendant deserved a 12-year 2-month sentence, there is no reason to doubt that if the dual use objection had been made, the court would have made reference to one or more of the other aggravating factors that justified the sentence.

There was no prejudicial sentencing error.

Disposition

The judgment is affirmed.

POLLAK, P. J.

WE CONCUR:

TUCHER, J.
BROWN, J.